

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE
(PPA) PRODUCTS LIABILITY
LITIGATION,

MDL NO. 1407

ORDER DENYING DEFENDANTS'
MOTION TO DISMISS, OR IN THE
ALTERNATIVE, TO CHANGE VENUE

This document relates to:

Phyllis McComas v. Leiner
Health Products, Inc. et al.,
No. 3-cv-3881

Defendant Leiner Health Products, Inc. ("Leiner") moves this court for an order pursuant to Fed. R. Civ. P. 12(c)¹ to dismiss this action for lack of personal jurisdiction. Defendant Walmart Stores, Inc. ("Walmart") concedes that it is subject to personal jurisdiction in the State of New York.² In the alternative, defendants move for an order changing the venue of this matter pursuant to 28 U.S.C. 1404(a). Having reviewed the motion, the response filed, and the reply thereto, the court hereby finds and

¹In the alternative, Leiner moves for summary judgement pursuant to Rule 56(c) of the Federal Rules.

²Walmart requests that the court exercise its discretion and decline to entertain jurisdiction over the company in this matter.

1 rules as follows:

2 I. BACKGROUND

3 Plaintiff Phyllis McComas suffered a debilitating stroke on
4 October 4, 2000, allegedly after ingesting Equate, a
5 phenylpropanolamine ("PPA") containing product manufactured by
6 Leiner. Ms. McComas, a resident of Ohio, alleges that she
7 purchased the Equate product from a Walmart store in West
8 Virginia. On October 19, 2002, Ms. McComas filed suit against
9 Leiner and Walmart in the United States District Court, Southern
10 District of New York. The case was transferred to the Multi-
11 District Litigation 1407 on January 9, 2004.

12 Leiner is incorporated in Delaware with its principal place
13 of business in California. Walmart is incorporated in Arkansas.
14 Its principal place of business is also in Arkansas. Both Leiner
15 and Walmart applied for and received certificates of authority to
16 do business in New York.³ Walmart owns and operates over 60
17 stores in the State of New York. Leiner manufactures more than
18 400 vitamin and supplement products in addition to various other
19 products that are sold at more than 50,000 supermarkets in the
20 United States, many of which are located in New York State.

21 II. ANALYSIS

22 A motion for a judgment on the pleadings pursuant to Rule
23 12(c) may be made "after the pleadings are closed...if no
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25 ³Leiner filed the certificate on July 2, 1993 and Walmart
26 filed the certificate on June 6, 1990.

1 material facts remain at issue and the parties' dispute can be
2 resolved on both the pleadings and those facts of which the court
3 can take judicial notice." Fed.R.Civ.P. 12(c). The standard to be
4 applied to a Rule 12(c) motion is the same as a motion to dismiss
5 under Rule 12(b)(6). Sheppard v. Beerman, 18 F.3d 147, 150 (2d.
6 Cir.), cert. denied, 513 U.S. 816 (1994). The motion will be
7 granted only where "it appears beyond a doubt that the plaintiff
8 can prove no set of facts in support of [her] claim that would
9 entitled [her] to relief." Citibank v. K-H Corporation, 968 F.2d
10 1489, 1494 (2d Cir. 1992). When a motion to dismiss for lack of
11 jurisdiction is filed prior to discovery, the plaintiff may
12 defeat the motion by pleading in good faith legally sufficient
13 allegations of jurisdiction. Ball v. Metallurge Hoboken-Overpelt,
14 S.A., 902 F.2d 194, 197 (2d Cir. 1990), cert. denied, 111 S.Ct.
15 150 (1990)(stating that plaintiff need only make a prima facie
16 showing of jurisdiction); Marine Midland Bank v. Miller, 664 F.2d
17 899,904 (2d Cir. 1981).

18 A. Personal Jurisdiction pursuant to CPLR §301

19 In a diversity caselike this, the court must look to the
20 law of the forum state, in this case New York, to determine
21 whether jurisdiction exists. Amalgamet v. Ledoux & Co., 645 F.
22 Supp. 248, 250 (S.D.N.Y. 1986), citing Arrowhead v. U. Press
23 Int'l, 320 F.2d 219, 223 (2d Cir. 1963). Jurisdiction over non-
24 resident corporations is determined by New York Civil Practice
25 Law & Rules ("CPLR") §§ 301 and 302. Amalgamet, 645 F.2d at 249.
26 Plaintiff asserts that the court has jurisdiction over Leiner

ORDER

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1 pursuant to § 301. Under CPLR § 301, a foreign corporation is
2 amenable to suit in New York if it is engaged in a "continuous
3 and systematic course" of doing business. Id. at 249. Courts
4 interpreting New York law have consistently held that a foreign
5 corporation which registers to do business in the State of New
6 York and establishes the Secretary of State as its agent upon
7 whom process may be made, has consented to personal jurisdiction
8 in New York. Augsbury Corporation v. Petrokey Corporation, 97
9 A.D.2d 173, 176, 470 N.Y.S.2d 787, 789 (3d Dept. 1983) (holding
10 that "the privilege of doing business in New York is accompanied
11 by an automatic basis for personal jurisdiction"); Amalgamet, 645
12 F. Supp. at 249 (stating that the general rule is that a foreign
13 corporation which files a certificate of authority to do business
14 in New York has consented to personal jurisdiction in the state);
15 Robfogel Mill-Andrews Corp., v. Cupples Mfrs. Co., 323 N.Y.S.2d
16 381 (N.Y.Sup.Ct. 1971). It is also established that receiving
17 authorization to do business in New York and designating the
18 Secretary of State as an agent for service of process is
19 sufficient to confer jurisdiction regardless of whether any
20 business is actually conducted in the State. Id. at 383; Aaron v.
21 Agwilines, Inc., 75 F. Supp. 604, 606 (S.D.N.Y. 1948).

22 Plaintiff alleges that Leiner applied for and received a
23 certificate of authority to do business in the State of New York
24 (and thereby designated the Secretary of State as its agent for
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1 service of process⁴) on July 2, 1993. Plaintiff further asserts
2 that Leiner designated the County of New York as the location for
3 its office of the corporation within New York and selected a
4 Registered Agent to accept service of process which maintains an
5 office within the Southern District of New York. Leiner does not
6 dispute these allegations. Therefore, the court finds that
7 plaintiff has pled legally sufficient allegations of jurisdiction
8 to defeat Leiner's motion to dismiss.⁵

9 C. Venue

10 Pursuant to 28 U.S.C § 1391(a)(1), venue is proper in "a
11 judicial district where any defendant resides, if all defendants
12 reside in the same State" for diversity cases. Residence in a
13 state is determined by 28 U.S.C. § 1391(c) whereby a defendant is
14 "deemed to reside in any judicial district in which it is subject
15 to personal jurisdiction at the time the action is commenced."

16 As discussed *infra*, both Leiner and Walmart are subject to

17 ⁴By filing an application for authority to do business in
18 New York, Leiner also designated the Secretary of State as its
19 agent for service of process. NY CLS Bus. Corp. § 304 (2005).


20 ⁵Leiner's reliance on Bellepointe, Inc. v. Kohl's Department
21 Stores, 975 F. Supp. 562 (S.D.N.Y. 1997) is unfounded. In
22 Bellepointe the court stated that a "respectable argument may be
23 made that the mere existence of a certification of authority to
24 do business in New York is insufficient as a predicate of
25 jurisdiction *in those cases where the defendant is not in fact*
26 *doing business in the state* and the cause of action in no way
relates to the defendant's New York activities." Bellepointe, 975
F. Supp. at 564 quoting CPLR § 301, 1990 Practice Commentary
C301:4 (emphasis added). In the present case however, Leiner is
conducting business in New York. Leiner manufactures more than
400 vitamin and supplement products in addition to various other
products which are sold at more than 50,000 supermarkets, many of
which are located within the State of New York.

1 personal jurisdiction in the State of New York. Therefore, venue
2 is proper within a judicial district in the State. In defendants'
3 applications for authority to do business in New York, they each
4 directed the Secretary of State to forward copies of process to a
5 Registered Agent located within New York City. In the same
6 applications, both companies also selected New York County as the
7 county in which they will maintain an office of incorporation.
8 Having designated the Southern District of New York as the
9 location for their corporate office, its is disingenuous for
10 defendants to now object to a lawsuit within that District.

11 III. CONCLUSION

12 Based on the foregoing, the court DENIES defendants' motion
13 to dismiss pursuant to Federal Rule 12(c) or, in the alternative,
14 change venue pursuant to 28 U.S.C. § 1404(a).

15 DATED at Seattle, Washington this 10th day of June, 2005.

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17 BARBARA JACOBS ROTHSTEIN
18 UNITED STATES DISTRICT COURT
19 JUDGE
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